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To: [All of Judges \(EOIR\)](#); [BIA BOARD MEMBERS \(EOIR\)](#); [Stutman, Robin M. \(EOIR\)](#); [BIA ATTORNEYS \(EOIR\)](#); [All of OCIJ JLC \(EOIR\)](#); [BIA TEAM JLC](#); [BIA TEAM P \(EOIR\)](#); [King, Jean \(EOIR\)](#); [Alder Reid, Lauren \(EOIR\)](#); [Berkeley, Nathan \(EOIR\)](#); [Korniluk, Artur \(EOIR\)](#); [Cowles, Jon \(EOIR\)](#); [Bauder, Melissa \(EOIR\)](#); [Vayo, Elizabeth \(EOIR\)](#); [Kaplan, Matthew \(EOIR\)](#); [Lang, Steven \(EOIR\)](#); [Ramirez, Sergio \(EOIR\)](#); [Powell, Karen B. \(EOIR\)](#); [Taufa, Elizabeth \(EOIR\)](#); [Lovejoy, Erin \(EOIR\)](#); [Rodriguez, Bernardo \(EOIR\)](#); [Brazill, Caitlin \(EOIR\)](#); [Wilson, Amelia \(EOIR\)](#); [Sheehey, Kate \(EOIR\)](#)
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**EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW**
Office of Policy | Legal Education and
Research Services Division

| Policy & Case Law Highlights

February 27, 2018

Supreme Court

- [Jennings v. Rodriguez](#)

No. 15-1204, --- S. Ct. --- (February 27, 2018) (Bond)

Majority Opinion: Justice Alito delivered the opinion of the Supreme Court, reversing the Ninth Circuit’s judgment and remanding for further proceedings, holding that sections 235(b), 236(a), and 236(c) of the Immigration and Nationality Act do not give detained aliens the right to periodic bond hearings during the course of their detention. Citing *Clark v. Martinez*, 543 U.S. 371 (2005), the Court concluded that the Ninth Circuit misapplied the canon of constitutional avoidance in concluding otherwise. The Court instructed the Ninth Circuit on remand to reexamine whether the respondents can continue litigating their claims as a class before considering the merits of the respondents’ constitutional arguments in the first instance.

The Court held that, subject only to express exceptions, sections 235(b) and 236(c) of the Act authorize detention until the end of applicable proceedings. Specifically, the Court stated that sections 235(b)(1) and (b)(2), read most naturally, mandate detention of applicants for admission until certain proceedings have concluded. Until that point, nothing in the statutory text imposes a limit on the length of detention, and neither provision says anything about bond hearings. Nothing in the text of section 235(b)(1) or 235(b)(2) even “hints” that those provisions have an implicit 6-month limit on the length of detention. The Court stated that the respondents must show that this is a plausible reading in order to prevail under the constitutional-avoidance canon, but stated that the respondents simply invoke the canon without making any attempt to defend their reading. The Court also stated that the Ninth Circuit “all but ignored the statutory text,” relying instead on *Zadvydas v. Davis*, 533 U.S. 678 (2001), as “essentially granting a license to graft a time limit onto the text of [section 235(b)].” The Court distinguished the

provisions at issue in the instant case from Zadvydas's interpretation of section 241(a)(6) of the Act. The Court rejected the respondents' argument that the term "for" in sections 235(b)(1) and (b)(2) mandates detention only until the start of applicable proceedings. The Court declared that interpretation inconsistent with the meanings of "for"—"[d]uring [or] throughout" and "with the object or purpose of"—that make sense in the context of the statutory scheme as a whole.

In addition, the Court reasoned that section 236(c)'s language is "even clearer" than that of sections 235(b)(1) and (b)(2), because by allowing aliens to be released "only if" the Attorney General decides that certain conditions are met, section 236(c) "reinforces the conclusion that aliens detained under its authority are not entitled to be released under any circumstances other than those expressly recognized by the statute." Together with section 236(a), section 236(c) makes clear that detention of aliens within its scope must continue "pending a decision" on removal. Thus, contrary to the respondents' reading, section 236(c) is not "silent" as to the length of detention. Further, section 236(c), by expressly stating that covered aliens may be released "only if" certain conditions are met, also unequivocally imposes an affirmative prohibition on releasing them under any other conditions. Moreover, the Court rejected the respondents' contention that their reading of section 236(c) is necessary to prevent a provision of the USA PATRIOT Act from being superfluous, as the respective provisions apply to different categories of aliens in different ways.

The Court also held that no justification exists for any of the procedural requirements that the Ninth Circuit "layered onto [section 236(a)] without any arguable statutory foundation." The Court stated that nothing in section 236(a) supports the imposition of periodic bond hearings every 6 months in which the Attorney General must prove by clear and convincing evidence that continued detention is necessary, nor does the provision "even hint" that the length of detention prior to the bond hearing must be considered in determining whether an alien should be released.

Concurring Opinion: Justice Thomas joined by Justice Gorsuch (except for footnote 6) concurred in Part I and Parts III-VI and concurred in the judgment. The concurring justices would vacate the judgment below and dismiss the case for lack of jurisdiction under section 242(b)(9) of the Act.

Dissenting Opinion: Justice Breyer filed a dissenting opinion, in which Justices Ginsburg and Sotomayor joined. The dissent concluded that the Act should be read as "requiring bail hearings, presumptively after six months of confinement." The dissenting justices stated that bail proceedings in instances of prolonged detention should "take place in accordance with customary rules of procedure and burdens of proof rather than the special rules that the Ninth Circuit imposed."

EOIR's Office of General Counsel is working with the Solicitor General's Office to determine next steps.

